TABLE OF CONTENTS

	Page
SUMMARY STATEMENT	1
THE FACTS	3
1. The Contract and the Market	3
2. This Action	5
STATUTES INVOLVED	5
QUESTIONS PRESENTED	6
REASONS FOR DENYING THE WRIT	7
(1) The contract is within the category prohibited by Section 3	7
(2) Coal is a "line of commerce", and a contract foreclosing competition within the coal industry for a twenty-year period is a violation of Section 3	10
(3) The applicability of Section 3 does not depend upon whether the seller is "dominant"	15
(4) The courts below properly refused to grant judgment enforcing the unlawful contract	18
(5) There is no conflict of circuits	22
(6) The contract at bar is invalidated by Sections 1 and 2 of the Sherman Act	23
CONCLUSION	24

CITATIONS

CASES

Anchor Serum Co. v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954) 7, 8

Beloit Culligan Soft Water Service, Inc. v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959) 2, 22, 23

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) 8

Page

Bromberg v. *Moul*, 275 F. 2d 574 (2d Cir. 1960) 22
Detroit-Kentucky Coal Co. v. *Bickett Coal & Coke Co.*, 251 Fed. 542 (6th Cir. 1918) 19
Dictograph Products, Inc. v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955) 7
Dole Refrigerating Co. v. *Kold-Hold Mfg. Co.*, 185 F. 2d 809 (6th Cir. 1950), *modifying and affirming* 87 F. Supp. 323 (E.D. Mich. 1949) 9
E.E. Taenzer & Co. v. *Chicago R.I. & P. Ry. Co.*, 191 Fed. 543 (6th Cir. 1911) 19
Fashion Originators' Guild of America, Inc. v. *Federal Trade Commission*, 312 U.S. 457 (1941) 9
George Van Camp & Sons Co. v. *American Can Co.*, 278 U.S. 245 (1929) 11
Gibbs v. *Consolidated Gas Co. of Baltimore City*, 130 U.S. 396 (1889) 19
Indiana Farmer's Guide Publishing Co. v. *Prairie Farmer Publishing Co.*, 293 U.S. 268 (1934) 8, 24
International Salt Co. v. *United States*, 6 F.R.D. 302 (S.D.N.Y. 1946), *aff'd*, 332 U.S. 392 (1947)....8, 10, 13, 14, 16, 23
Jarrett v. *Pittsburgh Plate Glass Co.*, 131 F. 2d 674 (5th Cir. 1942) 19
Judson L. Thomson Mfg. Co. v. *Federal Trade Commission*, 150 F. 2d 952 (1st Cir. 1945), *cert. denied*, 326 U.S. 776 (1945) 14
Kelly v. *Kosuga*, 358 U.S. 516 (1959) 3, 10, 19, 20, 22
Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) 23
Klor's, Inc. v. *Broadway-Hale Stores*, 359 U.S. 207 (1959) 8
LeJohn Manufacturing Co. v. *Dwight Webb, Jr.*, 222 F. 2d 48 (D.C. Cir. 1955) 19
McCullough v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U.S. 813 (1948) 9, 15
McMullen v. *Hoffman*, 174 U.S. 639 (1899) 20
Montague & Co. v. *Lowry*, 193 U.S. 38 (1904) 8
National Lockwasher Co. v. *George K. Garrett Co.*, 137 F. 2d 255 (3rd Cir. 1943) 9

Page

National Transformer Corp. v. *France Mfg. Co.*, 215 F. 2d 343 (6th Cir. 1954) 15

Norfolk Southern Bus Corp. v. *Virginia Dare Transportation Co.*, 159 F. 2d 306 (4th Cir. 1947), *cert. denied*, 331 U.S. 827 (1947) 15

Northern Pacific Railway Co. v. *United States*, 356 U.S. 1 (1958) 14, 16

Oxford Varnish Corp. v. *Ault & Wiborg Corp.*, 83 F. 2d 764 (6th Cir. 1936) 21

Pennsylvania Water & Power Co. v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. 2d 552 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 (1950) 15

Scott Paper Co. v. *Marcalus Mfg. Co.*, 326 U.S. 249 (1945) 21

Signode Steel Strapping Co. v. *Federal Trade Commission*, 132 F. 2d 48 (4th Cir. 1942) 14

Sola Electric Co. v. *Jefferson Electric Co.*, 317 U.S. 173 (1942) 15, 21

Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U.S. 346 (1922) 7, 16

Standard Oil Co. of California v. *United States*, 337 U.S. 293 (1949) 7, 8, 9, 13, 15, 16, 17, 18

Times-Picayune Publishing Co. v. *United States*, 345 U.S. 594 (1953) 8, 15

United States v. *American Can Co.*, 87 F. Supp. 18 (N.D. Cal. 1949) 9, 23

United States v. *Bethlehem Steel Co.*, 168 F. Supp. 576 (S.D.N.Y. 1958) 11

United States v. *E.I. duPont de Nemours & Co.*, 353 U.S. 586 (1957) 11

United States v. *Linde Air Products Co.*, 83 F. Supp. 978 (N.D. Ill. 1949) 9

United States v. *Pullman Co.*, 50 F. Supp. 123 (E.D. Pa. 1943), *aff'd*, 330 U.S. 806 (1947) 8, 23

United States v. *Yellow Cab Co.*, 332 U.S. 218 (1947) .. 8, 24

Weil v. *Neary*, 278 U.S. 160 (1929) 19

Weitzel v. *Brown-Neil Corp.*, 152 F. Supp. 540 (N.D. W.Va. 1947), *aff'd*, 251 F. 2d 661 (4th Cir. 1958) .. 19

William Goldman Theatres, Inc. v. *Loew's, Inc.*, 150 F. 2d 738 (3rd Cir. 1945), *cert. denied*, 334 U.S. 811 (1948) 24

Page

W.R. Grace & Co. v. *Civil Aeronautics Board*, 154 F. 2d 271 (2d Cir. 1946), *cert. dismissed*, 332 U.S. 827 (1947) 21

STATUTES

Clayton Act, Section 3, 38 Stat. 731, 16 U.S.C. § 14 ..... 5, 6
Sherman Act, Sections 1 and 2, 26 Stat. 209, as amended, 15 U.S.C. §§ 1-2 6

MISCELLANEOUS

6 CORBIN ON CONTRACTS, § 1399 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 931

TAMPA ELECTRIC COMPANY, *Petitioner,*

v.

NASHVILLE COAL COMPANY, NASHVILLE COAL, INC. and WEST KENTUCKY COAL COMPANY, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUMMARY STATEMENT

Petitioner brought this action for a declaratory judgment declaring that the contract in issue "is a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants according to its terms" (R. 7a).[1] It now seeks certiorari from a decision of the Sixth Circuit affirming the decision of the District Court for the Middle District of Tennessee denying the relief sought (Wm. E. Miller, J.). Both

[1] The designation "R" refers to the Appendices filed in the Court below. Appellant's (i.e., Petitioner's) Appendix comprises pages 1a-78a, inclusive, and Appellees' (i.e., Respondents'), pages 1b-3b, inclusive.

courts correctly and faithfully applied Section 3 of the Clayton Act to the undisputed facts of the case. They declined to lend the aid of the courts to the enforcement of an executory, twenty-year requirements contract: That is, a contract which *for twenty years* confined the huge coal requirements of petitioner to a single supplier, and which thereby excluded from the major coal market of the State of Florida any supplier other than the contracting vendor.

The coal engrossed by the contract far exceeds the total annual consumption of coal in the State of Florida by other users. Its dollar value, over the twenty-year life of the contract, is in excess of $128,000,000. (Pet., App. A, p. 11a).

The present case is unusual in antitrust litigation because of the extent and degree to which each of the points involved has already been settled by decisions of this Court. Petitioner's brief is necessarily based upon an effort to distinguish these decisions so as neatly to exclude the present case from the ambit of Section 3, notwithstanding this Court's prior holdings.

Petitioner also claims that the present decision is in conflict with the decision of the Seventh Circuit in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan, Inc.*, 274 F. 2d 29 (7th Cir. 1959), in which certiorari has not been sought. This is clearly unfounded, as the Court of Appeals below held. (Pet., App. A, p. 13a). *Culligan* did *not* enforce a requirements contract which violated Section 3. It correctly recognized and stated that it could not and would not enforce such a contract, since to do so would be "enforcing the specific conduct prohibited by the Act." As will appear, pp. 22-23 *infra*, it enforced a *partially executed* franchise agreement

only after the invalid requirements provisions had been excised.

Petitioner's final point is that the invalidity of the contract may not be asserted by the seller in defense of this action for declaratory judgment. This position is refuted by the principle recognized by this Court in *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959), that judicial assistance is not available when "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act." Petitioner does not discuss the *Kelly* case.

For the reasons herein set forth, we respectfully submit that this Court should not grant the petition for certiorari.

THE FACTS

1. The Contract and the Market

Briefly stated, petitioner and respondents' predecessor entered into a contract under which the seller was "to supply the *total requirements* of fuel of the Buyer for the operation of its first two units to be installed at [Buyer's] Gannon Station . . . which fuel requirements shall be not less than 225,000 tons of coal per unit per year". It was further agreed that if "during the first 10 years of the term of this contract the Buyer constructs additional units in which coal is used as the fuel . . . the fuel requirements thereof shall be added to this contract and be furnished by the Seller and accepted by the Buyer." (R. 9a-10a, emphasis supplied). A third coal-burning unit was in fact under construction when the suit was brought and more were planned. (Pet., pp. 4, 6).[2]

[2] As to the additional units, the Buyer could decide whether coal or some other fuel was to be used (R. 10a).

The Gannon units were petitioner's only coal-burning units, and the coal engrossed by the contract was the petitioner's total requirements—for twenty years. As shown by the record, the petitioner's actual requirements for each of the years 1959 and 1960 were estimated by it as 700,000 tons, and for 1961, as 1,000,000 tons. Petitioner estimated that its needs would "increase as required to about 2,250,000 tons per year." (R. 36a).

These requirements are indeed huge: They far exceed petitioner's total fuel consumption in its oil installations, which correspond to 825,000 tons of coal (R. 43a; 65a). They far exceed the total amount of coal otherwise consumed in the entire State of Florida —i.e., about 700,000 tons (R. 60a). Based only on petitioner's requirements for 1960 of 1,000,000 tons (which it states will increase to 2,250,000 tons), the dollar value of coal engrossed is $6,400,000 annually or $128,000,000 over the twenty year period (Pet., App. A, p. 11a).

At the time that petitioner filed the present action for declaratory judgment, no coal had been delivered under the contract (R. 7a). Suitable coal was and is available from many suppliers. Petitioner admits that the Seller was "only one of some 700 coal producers who could serve" its needs. (R. 68a; 1b).[3]

---

[3] Petitioner's president testified as follows in a 1958 proceeding before the Florida Railroad and Public Utilities Commission (R. 2b):

"Q. Now, have you contacted any other company to see——

A. Coal companies?

Q. Coal companies.

A. We have coal companies in and out of our office so fast that

In fact, petitioner later made a contract, to replace the contract in issue, with Love & Amos Coal Company for specified tonnages of coal on a twelve-month basis: That is, the contract expressly provides "Cancellable on 12 months notice by supplier or purchaser." (R. 36a).

2. This Action

Petitioner brought this action for declaratory judgment, expressly to enforce the contract. It recited the fact that respondents had notified petitioner that the contract as drawn was invalid under Section 3 of the Clayton Act; and it prayed for a judgment declaring:

> "That said contract dated May 23, 1955 is a valid, lawful and enforceable contract and is binding upon the plaintiff and defendants, *according to its terms.*" (R. 7a; emphasis supplied.)

On motions for summary judgment by both petitioner and respondent, the District Court, in an able opinion (Pet., App. C), entered judgment dismissing the complaint. The Court of Appeals affirmed (Miller and Cecil, JJ; Weick, J., dissenting; Pet., 9 App. A).

STATUTES INVOLVED

Both lower courts disposed of the case under Section 3 of the Clayton Act (38 Stat. 731, 15 U.S.C. § 14). In pertinent part, this section provides:

---

the receptionist doesn't know where to seat them to give them time to talk to people.

• • • • •

A. We have received innumerable offers of coal at various prices per ton. I couldn't possibly sit here and remember which price of coal per ton related to the BTU's per pound or any number of such things."

> "It shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Respondents also challenged the contract as unlawful under Sections 1 and 2 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. §§ 1-2), but the courts below did not find it necessary to consider the Sherman Act questions (Pet., App. A, p. 13a; App. C, p. 51a).

QUESTIONS PRESENTED

1. Did the courts below err in refusing, under Section 3 of the Clayton Act, to issue a declaratory judgment declaring to be valid and enforceable, a contract which for twenty years commits a Florida public utility to buy from a single vendor, to the exclusion of hundreds of other willing and available sellers, all of the coal required by the utility's only coal-burning facility, in amounts exceeding 1,000,000 tons and $6,400,000 per year—or more than the total annual coal consumption of the State of Florida when the contract was made—and aggregating at least 20,000,000 tons and $128,000,000 over the twenty-year life of the contract?

2. May a declaratory judgment be entered declaring such a contract valid and enforceable notwithstanding the provisions of Sections 1 and 2 of the Sherman Act?

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the decision below is clearly correct in its application of Section 3 of the Clayton Act; because the courts below faithfully applied the antitrust laws, pursuant to their terms as construed by this Court; because the decision below follows settled law established by prior decisions of this Court; because the decision raises no new question to warrant the Court's review; and because there is no conflict in the Circuits.

(1) *The contract is within the category prohibited by Section 3.* Petitioner's first argument is that the contract is not within the category defined by Section 3: That is, a contract "on the condition, agreement or understanding" that the buyer will not "use or deal in" goods of a competitor or competitors of the seller. This argument is manifestly untenable. *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922); *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); *Anchor Serum Co.* v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954).

The contract requires the buyer *for twenty years* to obtain from a single seller all the coal it requires for its present and projected requirements, to the exclusion of hundreds of competing sellers. Those requirements are extremely large—involving a sales volume exceeding $128,000,000. The tonnages to be delivered each year, from 1961 onwards, surpass the total annual purchases by all other coal buyers in the entire state of Florida. From these facts, the decision clearly follows, as a matter of law, that the contract is unlawful.

Standard Oil Co. of California v. *United States, supra*; *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); see *Times Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 608 (1953).[4] There is no refuge for petitioner in the fact that the offensive agreement is limited in geographical scope to the area it serves or for that matter to a single city. See *Standard Oil Co. of California* v. *United States, supra*, 337 U.S. at 299, n. 5; compare *Montague & Co.* v. *Lowry*, 193 U.S. 38, 46 (1904); *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 278-80 (1934); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225-27 (1947); *Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959).[5]

The vice of the contract is compounded by its stipulated foreclosure of competition for an irreducible term of twenty years. As the three-judged trial court said of the 25-year exclusive contracts condemned in *United States* v. *Pullman Co.*, 50 F. Supp. 123, 129 (E.D. Pa. 1943), *aff'd.*, 330 U.S. 806 (1947):

---

[4] The total volume of commerce engrossed in this case surpasses the total dollar volume cited in *Standard Oil Co. of California, supra*, 337 U.S. at 295-96 ($66,000,000), where the contracts were cancellable on short notice (*id.* at 296). On an annual basis—i.e., $6,400,000 per year (p. 4, *supra*)—it is more than 12 times the $500,000 per year held sufficient for purposes of Section 3 in *International Salt, supra*, 332 U.S. at 395, and also in the *Anchor Serum* case, *supra*, 217 F. 2d at 873.

[5] As this Court noted in *Standard Oil Co. of California, supra*, "§ 3 of the Clayton Act was directed to prohibiting specific practices even though not covered by the broad terms of the Sherman Act" (337 U.S. at 297), and it "set up an express prohibition against a practice thought to be beyond the reach of the Sherman Act" (*id.* at 312).

> "As a competition killer the long term contract is an effective weapon. . . . Even a patentee is not so secure against the passage of time."[6]

The period of the present contract, covering an entire generation, contrasts with the six month term of the requirements contracts condemned under Section 3 of the Clayton Act in *Standard Oil Co. of California, supra*, 337 U.S. at 296. It is twenty times the one-year period considered permissible for requirements contracts under Section 3 in *United States* v. *Linde Air Products Co.*, 83 F. Supp. 978, 982 (N.D. Ill. 1949), and under the Sherman Act in *United States* v. *American Can Co.*, 87 F. Supp. 18, 31 (N.D. Cal. 1949). It is far longer than the periods deemed excessive in both those cases. This inordinate duration of the present contract alone condemns it as an illegal suppression of competition.

The fundamental requisite for a competitive economy, as envisaged by the antitrust laws, is of course freedom of access by sellers and buyers to "outlets" and "sources" (*Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457, 465 (1941)). This was emphatically reiterated by the

---

[6] The antitrust laws forbid even a patentee to license his invention on terms preventing the licensee from using competitive processes or goods. *National Lockwasher Co.* v. *George K. Garrett Co.*, 137 F. 2d 255 (3rd Cir. 1943); *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U.S. 813 (1948); *Dole Refrigerating Co.* v. *Kold-Hold Mfg. Co.*, 185 F. 2d 809, 816-17 (6th Cir. 1950), *modifying and affirming* 87 F. Supp. 323 (E.D. Mich. 1949).

In its exclusion of competing goods, the contract at bar embodies restraints which are improper under a lawful patent and for a term longer than the permissible 18 year life of a patent.

declaration of *International Salt*, *supra* (a tying case), that "it is unreasonable, *per se*, to foreclose competitors from any substantial market" (332 U.S. at 396).[1]

The complaint in this case seeks to induce the courts to vindicate precisely the result prohibited by the antitrust laws. It prays the Court to declare that this contract, foreclosing hundreds of the seller's competitors from a huge coal market, "is binding upon the plaintiffs and defendants, according to its terms" (p. 1, *supra*). Such a declaration would be squarely opposed to the established rule, recently restated by this Court in *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959), that the courts will not enter a judgment which "would itself be enforcing the precise conduct made unlawful by the Act."

(2) *Coal is a "line of commerce", and a contract foreclosing competition within the coal industry for a twenty-year period is a violation of Section 3.* Petitioner seeks to avoid the effect of Section 3 by arguing that the contract covers only its requirements of *coal* for present and planned units; that it does not cover petitioner's requirements for oil used in other units; and that it does not cover requirements for coal if petitioner should some day decide to convert its oil-burning units to coal or to build a plant that is not covered by the contract.

The short and decisive answer to this argument is that coal and oil are not a single "line of commerce";

---

[1] The subject of the present case is a requirements contract, and does not involve the question of *per se* application either of Section 3 or of the Sherman Act. The Court of Appeals so noted (Pet. App. A, p. 7a). As both courts below held, the actual proof of the anticompetitive effect in the present case is overwhelming (Pet. App. A, pp. 10a-11a; App. C, pp. 40a-43a).

that coal is a separate and distinct "line of commerce" within the meaning of Section 3 of the Clayton Act; and that, to quote the Court of Appeals, "the remote possibility" that petitioner might possibly some day put itself in a position where it could use a competitor's coal "is an immaterial factor in the actual picture before the Court" (Pet., App. A, p. 9a). Rather, Section 3 applies, as the Court ruled, because "the contract requires the appellant to purchase all of its present, and its planned future, requirements of coal from a single seller" (*Ibid.*).

Both lower courts correctly decided that coal is a separate "line of commerce" from oil under Clayton Act standards (Pet., App. A., p. 9a; App. C., p. 44a). As they perceived, any other view is incompatible with this Court's construction of the identical phrase in Sections 2 and 7 of the Clayton Act. *George Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253 (1929); *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-94 (1957); see also *United States* v. *Bethlehem Steel Co.*, 168 F. Supp. 576, 595 (S.D.N.Y. 1958).

Coal and oil cannot be burned in the same equipment at petitioner's generating plants (Pet., p. 23). They are not interchangeable within the Clayton Act's frame of reference. For purposes of that statute, to quote *Van Camp*, *supra*, coal must be separately regarded as "*one* out of *all* the various lines of commerce" (278 U.S. at 253). Or to paraphrase the *duPont* case, *supra*, both coal and oil "have sufficient peculiar characteristics and uses . . . to make [each] a 'line of commerce' within the meaning of the Clayton Act" (353 U.S. at 594-94). As the *duPont* case illustrates, the point is that the phrase—"in any line of commerce"—was in-

tended to sharpen the thrust of the Clayton Act by making its specific provisions apply to any separate and distinguishable segment within the same industry.

As both lower courts also noted (Pet., App. A., p. 11a; App. C., p. 45a), it is wholly beside the point to argue that the subject contract stimulated competition with oil in the Florida Peninsula by introducing coal as fuel. In the trial court's words:

> "Inquiries of this kind were expressly rejected as irrelevant in Standard Oil Company of California, et al. v. United States, 337 U.S. 293."[8]

There is no room to quarrel here with this Court's rejection of such considerations as irrelevant. In fact, the introduction of coal as a competitor to oil in Florida would follow from the use of coal—not from the twenty-year exclusionary contract. As petitioner itself subsequently proved,[9] it could easily obtain adequate coal supplies from any of 700 coal producers, without resort to an illegally preemptive commitment.

In principle, Section 3 does not tolerate the stimulation of competition with oil at the sacrifice of the competitive opportunities of hundreds of other qualified coal vendors, for an irreducible twenty-year period, to supply the needs of a coal market greater than the entire balance of the state. The resultant vice of the contract, within the meaning of Section 3, is precisely the

---

[8] Among the conceivable economic justifications rejected in that case was the utility of a requirements contract to a "newcomer," seeking to enter a market dominated by "entrenched competitors" (337 U.S. at 307).

[9] Petitioner contracted with the Love & Amos Coal Company on a year-to-year basis (p. 5, *supra*).

same as that condemned, as follows, in *International Salt, supra* (332 U.S. at 398):

> "If others cannot produce salt equal to reasonable specifications for machine use, it is one thing; but it is admitted that, at times, at least, competitors do offer such a product. *They are, however, shut out of the market by a provision that limits it, not in terms of quality, but in terms of a particular vendor.*" (Emphasis supplied.)

Similarly, the hypothetical possibility that petitioner might some day construct a generating unit using coal which would not be covered by the contract is of no avail. If this were a defense, little would be left of Section 3. Its prohibitions could always be avoided by the simple device of limiting requirements contracts to the buyer's existing plants and the process could easily be repeated as new ones were built. The controlling factors are that petitioner's total coal requirements, in huge amounts, for all present and actually projected facilities are committed to a single seller for twenty years, and that hundreds of qualified competitors are excluded from the market.

Indeed, even if it were true—which it is not—that petitioner was in the market for coal for other units, the present contract would violate Section 3 because of the huge market thereby reserved to a single buyer and the extended period of the reservation. If, for example, General Motors entered into a twenty-year contract to buy from a single supplier all of the steel or electrical equipment needed by its Chevrolet Division, that contract would undoubtedly be within the scope of Section 3, although General Motors would be free to deal elsewhere for the similar requirements of its other divisions.

The decided cases so teach. Thus, the salt contracts outlawed in *International Salt, supra*, covered only the seller's particular machines. It was deemed irrelevant that the buyer was free to acquire and use competing equipment, in which other salt could be used. See *United States* v. *International Salt*, 6 F.R.D. 302, 307 (S.D.N.Y. 1946), *aff'd.*, 332 U.S. 392 (1947); *Standard Oil Co. of California* v. *United States, supra*, 337 U.S. at 305; *Northern Pacific Railway Co* v. *United States*, 356 U.S. 1, 10, n. 8 (1958).[10] In two other Section 3 cases, appellate courts have condemned similarly limited preclusive agreements, although the buyers were at liberty to procure, and were in fact using, competitive equipment and materials. *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48, 52 (4th Cir. 1942); *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (1st Cir. 1945), *cert. denied*, 326 U.S. 776 (1945).

No such elements are in fact present in this case, and, as the lower courts held, it must be decided on the basis of reality, not conjecture. The reality is that the present contract confines to a single seller all, and not part, of petitioner's coal requirements for twenty years. It is beyond question, we submit, that such a contract is prohibited by Section 3.[11]

---

[10] In this connection *Northern Pacific* said (356 U.S. at 10, n. 8):

> "As a matter of fact the defendant in International Salt offered to prove that competitive salt machines were readily available which were satisfactory substitutes for its machines (a fact the Government did not controvert), but the Court regarded such proof as irrelevant."

[11] It is of no moment that the prohibited preemption is accomplished by a single contract. The statute is worded in the singular.

(3) *The applicability of Section 3 does not depend upon whether the seller is "dominant".* Petitioner also argues that Section 3 applies only to situations where a "dominant" seller imposes upon the buyer the condition that the buyer shall not "use or deal in" the goods of competitors (Pet. 15-18).

This argument has no basis in the statutory language, and this Court has expressly ruled to the contrary. In *Standard Oil Co. of California, supra*, the Court expressly recognized that the seller did not have a "dominant position" in the market, but it nevertheless applied Section 3. 337 U.S. at 302, 309. In *Times-Picayune Publishing Co.* v. *United States* (a Sherman Act case), *supra*, 345 U.S. at 608-609, the Court reiterated the point, stating that the precise prohibition of

---

It is satisfied when "*a*" contract produces the forbidden competitive result. As the Court below aptly said (Pet., App. A, p. 6a):

> "A single contract of sale of sufficient magnitude, with performance extending over an extended period of time, can cause this result."

A single contract sufficed to bring Section 3 into play in *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. 2d 552, 559 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 (1950). Similarly, Section 1 of the Sherman Act is frequently applied to a single contract. See, e.g., *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942); *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co.*, 159 F. 2d 306 (4th Cir. 1947), *cert. denied*, 331 U.S. 827 (1947); *National Transformer Corp.* v. *France Mfg. Co.*, 215 F. 2d 343, 361-62 (6th Cir. 1954); *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U.S. 813 (1948).

If a single contract is reached by the Sherman Act, it is necessarily covered by Section 3, which "was directed to prohibiting specific practices even though not covered by the broad terms of the Sherman Act" (*Standard Oil Co. of California, supra*, 337 U.S. at 297).

Section 3 is violated either "[w]hen the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained" (emphasis in original).[12]

The test, of course, is to be found in the language of Section 3. The statute outlaws the making of "a" contract which excludes competition where the effect of the contract "may be to substantially lessen competition or tend to create a monopoly in any line of commerce". There is no qualification based on the respective economic strength of the contracting parties. As this Court noted in *Standard Oil Co. of California, supra*, it was established by *International Salt, supra*, that the application of the particularized prohibition of Section 3 follows "once it has been established that 'the volume of business affected' is not 'insignificant or insubstantial' and that the effect of the contracts is to 'foreclose competitors from [a] substantial market' " (337 U.S. at 304).[13]

Petitioner's effort, by reference to a variety of miscellaneous legislative materials, to narrow the scope of Section 3 to situations in which the seller has overpowered the buyer, and the buyer complains, is of no avail. As long ago as *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 356 (1922), this Court ruled that, in determining whether a contract comes within Section 3, "the words of the act are plain, and their meaning is apparent without the necessity of

---

[12] Cf. *Northern Pacific Railway Co.* v. *United States, supra*, 356 U.S. at 11.

[13] There is, of course, no issue in the present case under Section 3 as to whether a requirements contract is *per se* unlawful. See p. 10, n. 7, *supra*.

resorting to the extraneous statements and often unsatisfactory aid of such reports."

No amount of legislative discussion—even if petitioner's characterization of it were correct—can restrict Section 3 to situations involving numerous contracts dealing with " 'the distribution of goods' " (Pet. 16). The Section specifically applies to "*a* contract . . . for use, *consumption* or resale" (emphasis supplied).

Nor can Section 3 be sensibly limited solely to restraints imposed by a seller. For example, if General Motors were to contract to buy its entire twenty-year requirements of automobile radios from a single radio manufacturer, there is no doubt that Section 3 would be called into play, even if the contract were imposed by the buyer. The suppressive effect on competition would be the same as that of a twenty-year requirements contract imposed by United States Steel on a smaller automobile manufacturer—e.g., Studebaker-Packard. In both instances, a large amount of commerce would be removed from the competitive market for the period of the contract. In either case "observance by [the buyer] of his requirements contract with [the seller] does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage" (*Standard Oil Co. of California, supra*, 337 U.S. at 314).

The economic desirability or undesirability of an arrangement prohibited by Section 3 is equally irrelevant to the issue. This Court has emphasized that Congress, by enacting Section 3, has foreclosed judicial inquiry into the economic desirability of requirements contracts. The opinion in *Standard of California* carefully reviewed the possible economic justifications for

requirements contracts, including those now pressed by petitioner (337 U.S. at 306-308). But it was concluded that such considerations are immaterial in respect of preemptive contracts covered by Section 3. The Court held (337 U.S. at 311):

> "Congress has authoritatively determined that those practices are detrimental where their effect may be to lessen competition. *It has not left at large for determination in each case the ultimate demands of the 'public interest'*, as the English lawmakers, considering and finding inapplicable to their own situation our experience with the specific prohibition of trade practices legislatively determined to be undesirable, have recently chosen to do." (Emphasis supplied.)

Petitioner concedes that the natural gas cases—the only cases in which contracts for a term comparable to that in the present case have been upheld—are not in point because "no question of a violation of Section 3 was raised and . . . each dealt with a regulated 'natural monopoly'" (Pet. 23). They are, in fact, cases in which the regulated economy of the natural gas industry and the primary responsibility of the Federal Power Commission with respect to rate-making were the determining factors. They involve situations in which regulation has been substituted for competition as the national policy. The governing policy of the Congress is non-competitive in those cases, in sharp distinction to situations governed by Section 3.

(4) *The courts below properly refused to grant judgment enforcing the unlawful contract.* Petitioner argues that the illegality of a contract under Section 3 is not available to the seller as a defense. It apparently contends that only the *buyer* could invoke the illegality of the contract. This is obviously unfounded.

If so, the contract would be void for lack of mutuality. Cf. *Jarrett* v. *Pittsburgh Plate Glass Co.*, 131 F. 2d 674, 676 (5th Cir. 1942). Practically, the result would be that the petitioner, at any time during the twenty years, could denounce the contract and escape its obligations for the unexecuted portion of the contract, but the respondents would have no corresponding right of recourse. Petitioner's legal argument is that since the statute declares unlawful "a sale or contract of sale", it condemns only the seller's "act", and not the contract. This is merely a play on words. The contract was negotiated and entered into in violation of law, and is illegal. It is not legal as to the buyer and illegal as to the seller.[14]

Nor can the seller be procedurally estopped from invoking the illegality of the contract as a defense. This question, too, has recently been settled by this Court in *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959), which, strangely, petitioner does not discuss, although that decision was relied on by the court below (Pet. App. A., 12a). In *Kelly* v. *Kosuga*, *supra*, the seller sued for the price of onions which had been delivered to the buyer. The defense was that the purchase was part of an agreement in violation of the Sherman Act. The Court rejected the defense because the defendant had received

[14] There are numerous cases in which the defense of illegality has been asserted and established by the party against whom a statutory prohibition is in terms addressed. See, e.g., *Gibbs* v. *Consolidated Gas Co. of Baltimore City*, 130 U.S. 396 (1889); *Weil* v. *Neary*, 278 U.S. 160 (1929); *Detroit-Kentucky Coal Co.* v. *Bickett Coal & Coke Co.*, 251 Fed. 542, 546-47 (6th Cir. 1918); *E. E. Taenzer & Co.* v. *Chicago, R. I. & P. Ry. Co.*, 191 Fed. 543 (6th Cir. 1911); *LeJohn Manufacturing Co.* v. *Dwight Webb, Jr.*, 222 F. 2d 48 (D.C. Cir. 1955); *Weitzel* v. *Brown-Neil Corp.*, 152 F. Supp. 540, 545 *et seq.* (N.D. W.Va. 1947), *aff'd.*, 251 F. 2d 661 (4th Cir. 1958).

the onions, the sale of the onions was a separable transaction, and the Court would not be enforcing the unlawful agreement itself by allowing the seller to recover for the delivered merchandise at a fair price. The Court, however, reiterated the fundamental principle that it will not enforce a contract violative of the antitrust laws where "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act." [15]

Yet this is exactly the result that petitioner here seeks and relief must therefore be denied (p. 1, *supra*). As the Court below stated (Pet., App. A, p. 13a):

> "The contract in the present case is an executory one. It is not at the present time divisible into an executed portion and an executory portion so as to permit recovery for any portion which may have been performed without ordering a violation of the Act in the future. The appellant is seeking to have declared valid the very provisions which make it invalid. To do so would be to compel the parties to engage in business with each other over a period of twenty years in a manner which the Act declares invalid."

It is also impossible to reconcile petitioner's claims with the Congressional determination of public policy embodied in Section 3. Section 3 expressly compre-

---

[15] As the Court long ago held in *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899):

> "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, the courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."

hends the seller's competitors among its beneficiaries.[16] Their interests are completely ignored by the premise, implicit in petitioner's argument, that the buyer's insistence on performance estops a seller, even before deliveries commence, from disavowing a contract violative of Section 3. Such an estoppel would be incompatible with the public policy of the antitrust laws. *Sola Electric Co.* v. *Jefferson Electric Co., supra*, 317 U.S. at 177; *W. R. Grace & Co.* v. *Civil Aeronautics Board*, 154 F. 2d 271, 283 (2d Cir. 1946), *cert. dismissed*, 332 U.S. 827 (1947). Nor can debates about good or bad faith affect the result.[17] "The interest in private good faith is not a universal touchstone which can be made the means of sacrificing a public interest secured by an appropriate exercise of the legislative power" (*Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249, 257 (1945)).[18]

---

[16] See, e.g., *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764, 765 (6th Cir. 1936), where the performance of a contract violative of Section 3 was enjoined upon suit by a competitor of the seller.

[17] In fact, respondents here were not the original contracting sellers (Pet. 5; R. 6a).

[18] No antitrust citations support the passage from *Corbin on Contracts* recited in *Calligan* (Pet. 28-29). The reason is apparent from Professor Corbin's previous comments concerning the impact of the Sherman and Clayton Acts on contracts within their coverage. He states in this regard (6 *Corbin on Contracts* § 1399, at p. 553):

> "Any agreement that is within the provisions of either Act is necessarily an unenforceable agreement."

And he adds with specific reference to Section 3 (*id.* at p. 554):

> "Any contract for exclusive dealing is a deprivation of opportunity to competitors. Such a contract is illegal if it is shown that the deprivation effected by it 'may be' 'substantial' in amount."

(5) *There is no conflict of circuits.* The court below properly rejected petitioner's claim that affirmance of the trial court would produce a conflict with the decision of the Court of Appeals for the Seventh Circuit in *Beloit Culligan Soft Water Service, Inc.* v. *Culligan*, 274 F. 2d 29, decided December 15, 1959 (Pet., App. A, p. 13a). Contrary to petitioner's contention, *Culligan* is wholly consistent with the decision below. It nicely illustrates the correct application of *Kelly* v. *Kosuga, supra.*[19] *Culligan* enforced a franchise agreement *which had been performed* by the licensees, *and only "after* the excision of the requirements provision" (274 F. 2d at 34, emphasis supplied). The opinion expressly recognizes the seller's right to resist the enforcement of a contract which violates Section 3. The opinion correctly states (*Ibid.*):

> "We interpret the current view of the Supreme Court to be that a defense based on violation of Section 3 of the Clayton Act is valid if the contract at issue is intrinsically illegal; that is—if the Court, by its judgment, would be enforcing the specific conduct prohibited by the Act."

The *Culligan* Court accordingly emphasized that the buyers there—unlike petitioner—were not asking the Court to enforce an unlawful contract. The Court was able to enforce the contract—"after excision of the requirements provision"—because the seller had previously agreed to a provision of a Federal Trade Commission consent order which deleted the exclusionary

---

[19] See also *Bromberg* v. *Moul*, 275 F. 2d 574 (2d Cir. 1960), in which *Kelly* v. *Kosuga* was also correctly applied to dismiss an action for damages based on a contract effected at prices in excess of the ceilings established by the Office of Price Stabilization.

provisions of its agreements. 274 F. 2d at 31-32. This deletion was possible under the *Culligan* contracts because each contained severability clauses preserving the balance of the contract in the event that any provision should be declared illegal (*Ibid.*).[29]

(6) *The contract at bar is invalidated by Sections 1 and 2 of the Sherman Act.* Although the lower courts did not reach the Sherman Act questions, they may be considered here. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951). The undisputed facts clearly establish that the contract is violative of the Sherman Act, as well as the Clayton Act.

First, its twenty-year term is indefensible by Sherman Act standards. See *United States* v. *Pullman Co.*, *supra*, 50 F. Supp. at 129; *United States* v. *American Can Co.*, *supra*, 87 F. Supp. at 31. Next, considering the substantial size of the market preempted, and the undisputed evidence of the suppression of the opportunities of hundreds of willing competitors of the seller (pp. 4-5, *supra*), the contract embodies an unreasonable restraint within the meaning of the Sherman Act. Thus, in *International Salt*, *supra*, the Court held as follows that the Sherman Act, as well as Section 3 of the Clayton Act had been violated (332 U.S. at 396):

> "Not only is price-fixing unreasonable, *per se*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150; United States v. Trenton Potteries Co., 273 U.S. 392, but also it is unreasonable, *per se*, to foreclose competitors from any substantial market. Fashion Originators Guild v. Federal Trade Commission, 114 F. 2d 80; affirmed, 312 U.S. 457."

[29] The present contract contains no severability clause.

Further, the monopoly which the contract created is prohibited by Section 2 of the Sherman Act. See, e.g., *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., supra*, 293 U.S. at 279; *United States v. Yellow Cab Co., supra*, 332 U.S. at 225-27; *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F. 2d 738, 744 (3d Cir. 1945), *cert. denied*, 334 U.S. 811 (1948). To quote the *Goldman* case (150 F. 2d at 744):

> "We know of no authority which sanctions what would otherwise be an illegal monopoly simply because it operates in a single city or a particular part of a city and affects only a part of an industry involved. There is no such limitation on the effect of the antitrust laws."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ABE FORTAS
NORMAN DIAMOND
Attorneys for Respondents

Of Counsel:

ARNOLD, FORTAS & PORTER
1229 19th Street, N.W.
Washington 6, D. C.

June 11, 1960